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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1650

OTTO KERNER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1651

THEODORE J. ISAACS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–64a)[1] and the order and opinion denying the petitions for rehearing (Pet. App. 65a–72a) are not yet reported. The three opinions of the district court (Pet.

[1] "Pet. App." refers to the separate appendix filed jointly by the petitioners in this Court.

App. 73a–124a) are reported at 347 F. Supp. 743, 347 F. Supp. 763, and 364 F. Supp. 895.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1974. A petition for rehearing was denied on March 28, 1974. By orders of April 3, 1974 (in No. 73–1650), and April 19, 1974 (in No. 73–1651), Mr. Justice Rehnquist extended the time for filing the petitions for writs of certiorari to and including May 6, 1974. The petition in No. 73–1650 was filed on May 4, 1974, and that in No. 73–1651 on May 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner Kerner, a federal court of appeals judge, was properly subjected to indictment and trial prior to his removal from office.

2. Whether the mailings proved at trial were in furtherance of a "scheme or artifice to defraud" within the meaning of 18 U.S.C. 1341.

3. Whether a conviction of conspiracy (1) to travel in interstate commerce, to use facilities in interstate commerce, and to use the United States mail with intent to distribute the proceeds of bribery and (2) knowingly and willfully to use the United States mail in furtherance of a scheme to defraud may be sustained on the facts of this case where the court of appeals reversed convictions on substantive Travel Act counts for failure to show travel or use of facilities in interstate commerce but sustained convictions on substantive mail fraud counts.

4. Whether counts of the indictment charging perjury and false statements were properly joined with counts charging conspiracy, mail fraud, and use of interstate facilities in furtherance of bribery.

5. Whether petitioners were entitled to separate trials.

6. Whether false statements made by petitioner Kerner to Internal Revenue Service agents during the course of their criminal investigation of his income tax returns violated 18 U.S.C. 1001.

7. Whether the specially appointed panel below was required to follow decisions reached by the Seventh Circuit subsequent to its appointment.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The relevant constitutional provisions, statutes, and rule are set forth at Pet. App. 125a–131a.

STATEMENT

After a joint trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on numerous charges arising out of a scheme to accept bribes while petitioner Kerner was serving as Governor of Illinois and petitioner Isaacs was Director of the State Department of Revenue.[2] Both petitioners were convicted of conspiracy (18 U.S.C. 371), use of interstate facilities in furtherance of bribery (18 U.S.C. 1952), use of the mails in furtherance of a fraudulent scheme (18 U.S.C. 1341),

[2] Three other persons were charged in the indictment. One, Joseph Knight, was severed due to illness and died after the trial. Two others, William S. Miller and Faith McInturf, were granted immunity. With Marjorie Everett, an unindicted co-conspirator, Miller was a principal prosecution witness.

tax evasion (26 U.S.C. 7201), and filing false tax returns (26 U.S.C. 7206(1)). Kerner was also convicted of perjury before a grand jury (18 U.S.C. 1623) and of making false statements to agents of the Internal Revenue Service (18 U.S.C. 1001). Both petitioners were sentenced to concurrent terms of three years' imprisonment on each count and fined $10,000 on each of five counts. The court of appeals reversed the convictions on three counts under the Travel Act (18 U.S.C. 1952) and affirmed the convictions on the remaining counts of the indictment (Pet. App. 1a–65a).

The following summary of the events leading to this prosecution is taken from the opinion of the court of appeals (Pet. App. 3a–17a).

1. In 1960, when Kerner was the Democratic candidate for Governor of Illinois, Mrs. Marjorie Everett's racing enterprises contributed to his campaign through her associate, William Miller. Miller collected the money and gave it to Isaacs, who was Kerner's campaign manager. After his election, Kerner appointed Isaacs Director of the Department of Revenue and Miller Chairman of the Illinois Racing Board. At Isaacs' invitation, Miller submitted the names of persons whom Mrs. Everett had recommended for appointment to the Racing Board, and petitioner Kerner followed those recommendations in appointing members to the Board.

In 1961, Miller sought legislation that would permit Mrs. Everett, who already controlled two horse-racing tracks through her ownership of Chicago Thoroughbred Enterprises (CTE), to add a harness-racing corporation to her business enterprises. Such a law

was passed, and Kerner signed it. Mrs. Everett then organized Washington Park Trotting Association (WPTA) and Chicago Harness Racing, Inc. (CHR), both of which used the CTE facilities. Shares in the former were issued to nominees in favor of various legislators; CHR common shares were placed in a voting trust, and 50,000 shares were retained for distribution to persons who could help the company.

Miller and Mrs. Everett decided to make stock available to Kerner and Isaacs in order to ensure the award of favorable racing dates and other beneficial treatment. Accordingly, on November 8, 1962, Mrs. Everett wrote to Miller to confirm that she would sell 10,000 shares of WPTA common stock (at one dollar per share) and 25 shares of CTE common stock (at $1,000 per share) to Kerner and a smaller number of shares in the same companies at the same prices to Isaacs. Those prices were considerably below actual market value. On the following day Miller conveyed Mrs. Everett's offer to Kerner and Isaacs, and they accepted it. Thereafter, Isaacs repeatedly pressed Miller for delivery of the shares.

In the spring of 1964, when Kerner, in his capacity as governor, was awarding harness-racing dates, Miller advised him that Maywood Park Trotting Association, one of Mrs. Everett's competitors, was conducting its business fraudulently. Kerner contacted Thomas Bradley, then Chairman of the Harness Racing Commission, and told him that Maywood was insolvent and was being run by "wrong people." Bradley disputed these allegations, but Kerner nevertheless ordered him to cancel Maywood's autumn racing dates and reassign them to two other racing associations,

one of which was controlled by Mrs. Everett. Bradley refused to do so and held hearings at which substantial evidence supporting Maywood was submitted. Kerner, however, refused to meet with Bradley to discuss the matter and instead requested Bradley's resignation.

2. In 1964, after Kerner was re-elected, the allocation of racing dates was again in issue. Egyptian Trotting Association, which rented CTE facilities, had been tentatively assigned some desirable fall racing dates. After hearing rumors that the dates might be awarded to Maywood instead, Egyptian's director, Clyde Lee, met with Kerner to discuss the assignments. Kerner acknowledged that he personally would make the assignment, but he offered Lee no assurance of what his decision would be. Lee then discussed the matter with Mrs. Everett, who contacted James Hayes, one of the racing commissioners, and expressed her desire that Egyptian retain its fall dates. The dates were nevertheless awarded to Maywood, but Egyptian was awarded six additional racing dates.

3. In 1965, Illinois racing interests, including Mrs. Everett, were disturbed by prospective legislation that would have increased the state's revenues from thoroughbred and harness racing at the expense of the track operators. Clyde Lee met with Kerner, another state official, and Mrs. Everett's attorney. Mrs. Everett's accountants had prepared documents to show the detrimental effect of the legislation on certain harness-racing enterprises. Kerner agreed to consider the matter and, shortly thereafter, met with Issacs and Miller. They agreed to sponsor a proposal that was

more favorable to the track operators; that proposal was passed by the State legislature and signed into law by Kerner.

In August 1965, Kerner also signed a law abolishing the Harness Racing Commission and expanding the Racing Board. Miller was appointed chairman of the Board, and all but one of the new appointees were recommended to Kerner by Miller after discussions with Isaacs and Mrs. Everett.

4. In January 1966, Isaacs complained to Miller that he and "the old man" were impatient to receive the CTE stock promised by Mrs. Everett. Mrs. Everett then made 50 shares available. The purchase was facilitated by means of a $40,000 "loan" arranged by Miller. Joseph Knight, then the State Director of Financial Institutions, deposited the $40,000 check and drew another check in the same amount payable to Isaacs. Isaacs then deposited this check, together with a $5,000 check from Kerner payable to "cash," and typed "Repayment to TJI of advance payment of 25 CTE, balance owing to TJI is $20,000 plus interest at 5% from July 15, 1966" on the deposit slip.

On August 10, 1966, delivery of the shares to Isaacs was made by an attorney for Mrs. Everett's corporation. Isaacs tendered two checks drawn on his personal account and payable to Mrs. Everett—one for $50,000 and one for "interest" in the amount of $8,958. He also presented a promissory note backdated to November 12, 1962, promising to pay $50,000 at 5% interest, with the 50 shares pledged as security. Mrs. Everett's attorney cancelled the note and returned it to Isaacs and gave the CTE certificates to Miller. The

shares were worth $300,000 at the time of this transaction.

At the request of Miller and Isaacs, Mrs. Everett sent Isaacs a letter backdated to November 12, 1962, confirming the purchase of 50 shares of CTE at $1,000 per share and stating that she would hold the shares as collateral for Isaacs' $50,000 note, due on or before November 15, 1966, with interest at 5%. The "interest" paid by Isaacs at the August 10 meeting was not, in fact, due and was intended merely to corroborate the authenticity of the backdated note. In 1967, Kerner sent an IRS Form 1099 by mail to Mrs. Everett, reporting his share of the "interest" payment. (This mailing constituted the basis for the mail fraud charged in Count VI of the indictment.)

In the meantime, Knight deposited $11,200 (for which he was later reimbursed by Kerner and Isaacs) in Miller's account at the brokerage house of Sincere & Co. as payment for the 28,000 shares of CHR which had been allocated to Kerner and Isaacs. Two 14,000-share certificates were transferred to Knight's name. Mrs. Everett's attorney, George Schaller, subsequently agreed to act as nominee on behalf of the beneficial owners.

In the autumn of 1966, when CHR and CTE applied for their 1967 racing dates, the application listed Mrs. Everett as the owner of 2,000 shares of CTE and Schaller as the owner of 38,000 shares of CHR. The applications thus violated a regulation which required disclosure of dummy holdings and identification of the beneficial owners, since Kerner and Isaacs were each the beneficial owners of 25 of the CTE shares reported

by Mrs. Everett and 14,000 of the CHR shares reported by Schaller.

In early 1967, CHR declared a 20 cent per share dividend. Knight requested that Schaller pay the dividends "to the true owners [of the stock], whose identity I have disclosed to you orally." At Isaacs' request, Schaller then deposited the dividend checks in his account and wrote two personal checks, each in the amount of $2,800, payable to Kerner and Isaacs, respectively. (The mailing of the personal checks constituted the basis for the mail fraud charged in Count IX.)

In April 1967, Miller arranged for the purchase of the 28,000 CHR shares held by Kerner and Isaacs. Isaacs consented to the sale, and the purchaser drafted two checks payable to Schaller, each in the amount of $28,000. Schaller deposited these checks and wrote two others in the same amounts, payable to Knight. Isaacs delivered those checks to Knight, who deposited them in his account. Knight then wrote two checks, each for $7,000, payable to Kerner and Isaacs, respectively, and a check for $41,642.48 to repay the $40,000 "loan" which had been used in the purchase of the CTE stock. Knight then mailed one of the $7,000 checks to Kerner. (The mailing of Knight's check to Kerner formed the basis for the mail fraud charged in Count VIII.)

In May 1967, Isaacs and Kerner exchanged their CTE shares for 10,000 Balmoral Jockey Club (BJC) shares held by Mrs. Everett, so that she could return the CTE shares to the bank that had been holding them as collateral. The exchange was effected by

transferring the BJC shares to Knight, who acted as nominee. In June 1967, Miller acquired control of BJC. The application he filed on behalf of BJC for 1968 racing dates failed to disclose the beneficial interests of Kerner and Isaacs. The requested racing dates were granted, and a letter and form confirming that fact was mailed by the Board to BJC. (This mailing constituted the basis of the mail fraud charged in Count XIII.)

Subsequently, Miller bought the BJC shares owned by Kerner and Isaacs. To effect the purchase, Miller drafted a check for $300,000, payable to Knight. Knight endorsed the check in blank and delivered it to Isaacs. Isaacs arranged for a bank for which he performed legal services to negotiate the check without further endorsement (contrary to normal bank procedures). Isaacs opened a checking account for Kerner and savings accounts for himself and Kerner and deposited $15,000 in each savings account, $135,000 in Kerner's checking account and $135,000 in his own checking account. The net result of these transactions was the payment to Kerner and Isaacs of nearly $160,000 in return for payments by them of only $15,079 each.

5. On his 1967 federal income tax return, Isaacs reported the purchase of 14,000 shares of "Chicago Co." in 1966 for $5,600 and their sale a year later for $28,000. He also reported a 1967 sale for $150,000 of 25 shares of "Bajo Co." acquired in 1962 for $25,000. In his 1967 return, Kerner reported a "Chicago Co." transaction identical to that listed in Isaacs' return and a sale for $150,000 of 5,000 shares of "Balmoral,"

acquired in exchange for 25 shares of "C.T. Co." stock purchased for $25,000 in 1962. These "sales" were treated by both Kerner and Isaacs as giving rise to long-term capital gains. The government charged, however, and the jury found, that these items actually referred to the CTE and CHR stock that had been received as bribes in 1966 and were taxable as ordinary income for that earlier year. (Counts XVI and XVIII of the indictment charged Kerner and Isaacs, respectively, with income tax evasion. Counts XVII and XIX charged the making of false statements on the tax returns.)

In July 1970, two IRS special agents visited Kerner, who by that time was a judge of the United States Court of Appeals for the Seventh Circuit. After being advised of his rights, Kerner was asked to identify the "Chicago Co." listed on his 1967 return. Kerner denied that the item referred to CHR and instead falsely claimed that "Chicago Co." refered to a financial institution, that a named friend was an officer of that corporation, and that the stock had been purchased on a broker's recommendation. (These statements were the basis for Count XV, charging Kerner with making false statements in violation of 18 U.S.C. 1001.)

In 1971, Kerner requested an appearance before a federal grand jury investigating Illinois racing operations. During his testimony he denied that he had ordered Bradley to reassign Maywood's 1964 racing dates or that he had discussed the Egyptian Trotting Association racing dates with Clyde Lee. (Count XIV,

charging Kerner with perjury, was based upon those denials.)

6. Both Kerner and Isaacs presented evidence at trial, and Kerner testified in his own behalf. Isaacs did not take the stand.

ARGUMENT

1. Petitioner Kerner contends (Kerner Pet. 6-9) that his conviction effectively deprived him of his judicial power and therefore operated to remove him from the office of federal judge in a manner not authorized by the Constitution. He argues that he is not subject to criminal prosecution until he has been impeached by the House of Representatives and convicted by the Senate. This argument fails for two independent reasons.

a. First, there is no constitutional bar to the criminal prosecution of a federal judge. Although Article I, Section 6 of the Constitution grants members of Congress an express, if limited, immunity from arrest, the Constitution contains no similar grant of immunity, either from arrest or prosecution, for judges. Petitioner perforce relies on the final clause of Article I, Section 3, Clause 7, which provides that "the Party convicted [on impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." But the sole purpose of that caveat is to ensure that the Double Jeopardy Clause may not be invoked as a bar to criminal proceedings following removal from office by impeachment; it was not intended to, and does not by its terms, confer upon judges any immunity from prosecution prior to impeachment.

Historical practice and commentary support this view. The first Congress, many of whose members had been delegates to the Constitutional Convention, enacted Section 21 of the Act of April 30, 1790, 1 Stat. 117, recognizing that sitting federal judges were criminally punishable for bribery and providing for their disqualification from office upon conviction. In 1796 Attorney General Lee informed Congress that a judge of a territorial court, a civil officer subject to impeachment, was indictable for criminal offenses while in office. 3 Hinds, *Precedents of the House of Representatives* 982–983 (1907). In this century, two sitting federal judges (other than petitioner) have been indicted and tried while in office. See Borkin, *The Corrupt Judge* 95–186 (1962). And constitutional scholars have long agreed, with virtual unanimity, that "the ordinary tribunals * * * are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency." Rawle, *A View of the Constitution of the United States,* 215 (2d ed., 1829). See, *e.g.,* 1 Curtis, *Constitutional History of the United States* 481–482 (1889); Simpson, *A Treatise on Federal Impeachments* 52–53 (1916); Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions,* 39 Fordham L. Rev. 1, 55 (1970).

Moreover, there is no merit to petitioner's suggestion that conviction of a crime is constitutionally equivalent to removal from office. As this Court noted in connection with the criminal prosecution of a Senator, "the final judgment of conviction [does] not operate, *ipso facto,* to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him

as expelled by force alone of the judgment." *Burton* v. *United States*, 202 U.S. 344, 369. Whether the criminal conviction of a federal judge will lead to his removal by impeachment rests upon the sound judgment and discretion of the Congress. See Simpson, *supra*, at 52. Thus even those who insist most ardently that impeachment is the sole constitutional method of removing a federal judge from office nevertheless agree that "judges, like other people, can be tried, convicted, and punished for crimes * * *." *Chandler* v. *Judicial Council*, 398 U.S. 74, 141–142 (dissenting opinion of Mr. Justice Black).

b. Second, since petitioner Kerner failed to raise his office as a defense at trial, he is precluded from doing so on appeal. Fed. R. Crim. P. 12(b)(2). Cf. *Davis* v. *United States*, 411 U.S. 233. The court of appeals (by a vote of 2 to 1) resolved this question of waiver in petitioner's favor (Pet. App. 18a–20, 63a). The court of appeals, relying upon *Glidden Co.* v. *Zdanok*, 370 U.S. 530, apparently reasoned that a nonfrivolous constitutional claim relating to the power of the court to act necessarily concerns subject-matter jurisdiction. But this Court's holding in *Zdanok*—that the question whether an appellate court was properly constituted may be raised for the first time upon review of that court's decision—has no application here. Petitioner's claim has nothing to do with the trial court's general power to act; nor does it challenge the court's general subject-matter jurisdiction over federal crimes. Petitioner's claim is merely one of a personal immunity and that is a matter of personal jurisdiction that is waived if not raised at trial, as it was not here.

2. Petitioners contend (Kerner Pet. 9–12; Isaacs Pet. 29–33) that the bribery scheme here did not amount to a "scheme or artifice to defraud" within the meaning of the mail fraud statute, 18 U.S.C. 1341, and (Kerner Pet. 16–17) that the mailings here were not in any event in furtherance of that scheme.

a. Petitioners' statutory claim is that the mail fraud statute does not reach bribery schemes that defraud a State and its citizens of the honest services of their public officials. Petitioners complain that federal punishment of state officials for bribery is an unwarranted intrusion by the federal government into state affairs. But "Congress may forbid any mailing in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme itself or not." *United States* v. *Edwards*, 458 F. 2d 875, 880 (C.A. 5), certiorari denied *sub nom. Huie* v. *United States*, 409 U.S. 891. And since the purpose of the statute was to ensure the integrity of the national postal system by denying its facilities for use in any fraudulent plan (*Parr* v. *United States*, 363 U.S. 370, 389), mailings in furtherance of state bribery schemes are within its intended prohibition.

Petitioners argue that the statutory language, "scheme or artifice to defraud," covers only schemes involving tangible loss to victims. But it is well understood that no proof of tangible loss is required for conviction. *Shale* v. *United States*, 388 F. 2d 616, 618 (C.A. 5), certiorari denied, 393 U.S. 984; *United States* v. *George*, 477 F. 2d 508, 512 (C.A. 7), certiorari denied *sub nom. Yonan* v. *United States*, 414 U.S. 827. "Using a fiduciary position to obtain secret

profits is not only a breach of trust but an active fraud, and such conduct is condemned by the mail fraud statute if the mail is used in furtherance of the execution of said scheme." *United States* v. *Hoffa*, 205 F. Supp. 710, 716 (S.D. Fla.). See also, *Bradford* v. *United States*, 129 F. 2d 274, 276 (C.A. 5), certiorari denied, 317 U.S. 683; *United States* v. *Dorfman*, 335 F. Supp. 675 (S.D. N.Y.), affirmed on other grounds, 470 F. 2d 246 (C.A. 2); *United States* v. *Faser*, 303 F. Supp. 380 (E.D. La.).[3] In particular, it has long been understood that a scheme contemplating bribery of a public official is a scheme to defraud. *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574. There was, in any event, tangible loss here. The citizens of Illinois were deprived not only of the honest service of their public officials but also of the additional state revenues that would have been received if legislation favoring track operators had not been enacted; and the innocent racing associations in the State were deprived of the additional

[3] Nothing in *Epstein* v. *United States*, 174 F. 2d 754 (C.A. 6), on which petitioners rely, is to the contrary. The indictment there charged a scheme by corporate officers to sell supplies to their corporation at inflated prices, and the convictions were reversed because the government's proof showed that the prices were in fact at or below market. The court of appeals refused to sustain the conviction on a "breach of trust" theory that had not been presented by the prosecution at trial; moreover, it believed that a breach of trust would not amount to active fraud where the self-dealing violated no law or corporate charter. That decision obviously does not support petitioners here, who were tried on a theory of breach of trust with respect to acts that were criminal offenses under state law.

profits that might have accrued from an impartial assignment of racing dates.[4]

b. Petitioner Kerner relies upon *United States* v. *Maze*, No. 72–1168, decided January 8, 1974, in asserting that the mailings here were not in furtherance of the bribery scheme. But the relationship of the mailings to the effectuation of the scheme is far closer than in *Maze*. This Court summarized the critical facts in *Maze* as follows (slip. op. at p. 7):

> Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims utlimately [*sic*] bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all.

In contrast, the mailings here were critical to the success of the scheme, which depended for its full effectuation on concealment of petitioners' beneficial ownership of the stock that had been conveyed as a bribe and on conversion of those stock interests into cash in a clandestine manner. Petitioner Kerner's mailing of the IRS Form 1099 to Mrs. Everett purporting to show the payment of accrued interest (Count VI)

[4] It is irrelevant that petitioners were not solely responsible for the enactment of the legislation or the assignment of racing dates. "The fact that the official who is bribed is only one of several and could not award the contract by himself does not change the character of the scheme where he is expected to have influence enough to secure the end in view." *Shushan* v. *United States*, *supra*, 117 F. 2d at 115. See also *Bradford* v. *United States*, *supra*, 129 F. 2d at 276.

was part of a continuing scheme to conceal the fact that the stock had been received as a bribe rather than by purchase; Schaller's deposit of the dividend checks into his account and his mailing of personal checks to petitioners (Count IX) accomplished the transfer of cash to petitioners in a manner that would conceal their ownership interests in the racing enterprises; similarly, Knight's deposit of another of Schaller's checks into his own account and his subsequent mailing of substituted personal checks to petitioners (Count VIII) also resulted in their being paid off in secret; finally, the mailing of confirmation of racing dates to BJC on the basis of its false application (Count XIII) was a necessary link in the chain of events that permitted Mrs. Everett's company to profit from the bribery without disclosing petitioners' illegally obtained interests.

3. Count I of the indictment alleged a conspiracy "a. to travel in interstate commerce, to use facilities in interstate commerce, * * * and to use the United States mail, with intent to distribute the proceeds of bribery * * *; and b. to knowingly and wilfully use the United States mails and to cause the United States mails to be used in furtherance of a scheme to defraud" (J. App. 5a).[5] Petitioners contend here (Kerner Pet. 12–16; Isaacs Pet. 34–37) that, since the court of appeals reversed their substantive convictions under the Travel Act, they cannot logically be held guilty of

[5] "J. App." refers to the Joint Appendix in the court of appeals.

the conspiracy so alleged.[6] This contention is without merit.

It is settled that a single count of an indictment may allege a conspiracy to violate two or more statutes (*Frohwerk* v. *United States*, 249 U.S. 204) and that proof of any one of the alleged illegal objects of the conspiracy will support a conviction for the conspiracy. *United States* v. *Grizaffi*, 471 F. 2d 69 (C.A. 7), certiorari denied, 411 U.S. 964; *United States* v. *Goodwin*, 455 F. 2d 710, 713–714 (C.A. 10), certiorari denied, 409 U.S. 859; *Andrews* v. *United States*, 108 F. 2d 511, 515 (C.A. 4). In this case, Count I charged a conspiracy to violate both the Travel Act and the mail fraud statute, and the government presented ample evidence to show that petitioners devised a scheme to defraud the State of Illinois, its citizens, and its racing associations, and that the mails were knowingly caused to be used in furtherance of the scheme. And since the jury convicted petitioners of the substantive offense of mail fraud, this is not a case where the reviewing court has "no way of knowing" (*Yates* v. *United States*, 354 U.S. 298, 311) whether the jury found sufficient overt acts to support a proper conviction for conspiracy.[7] Thus petitioners' convictions

[6] In making this argument, petitioners attempt to raise the issue currently before the Court in *United States* v. *Feola*, No. 73-1123, certiorari granted April 15, 1974, *i.e.*, whether the conspirators' knowledge of the federal jurisdictional element must be separately proven in a federal conspiracy prosecution.

[7] Moreover, the jury was instructed that to find a conspiracy to use the mails in furtherance of a scheme to defraud it must find, *inter alia*, that use of the mails was either contemplated by the conspirators or reasonably foreseeable (Tr. 7457–7461). Thus the issue presented by *United States* v. *Feola*, *supra*, does not arise at all in this case.

for conspiracy are sustainable notwithstanding the reversal of their convictions on the substantive Travel Act counts.

4. Petitioner Kerner contends (Kerner Pet. 18–20) that he was prejudiced by the joinder of the count charging him with perjury before the grand jury with the other counts of the indictment. As petitioner Isaacs points out (Isaacs Pet. 21–24), the accepted test for joinder of offenses in multiple defendant trials is provided by Rule 8(b), Fed. R. Crim. P., which permits joinder of offenses committed in the same series of acts or transactions. See 1 Wright, *Federal Practice and Procedure: Criminal* 313, 318–319 (1969). Joinder of the perjury charge with the other charges was proper under that test. As the court of appeals stated (Pet. App. 50a):

> The perjury and other offenses with which we are concerned have a logical relationship. They are all connected with, or arose out of, a common plan to corruptly influence the regulation of horse racing. The perjury charge against Kerner related to his involvement with the racing industry, and evidence of that involvement was pertinent to the proof of the other offenses.

In short, the perjury and the other charged offenses arose from a common "series of acts or transactions" involving a scheme by public officials to perform favors for Mrs. Everett's racing interests in return for illegal bribes, and therefore were properly joined under Rule 8(b).

The district court properly denied petitioner Kerner's motion under Rule 14, Fed. R. Crim. P., for

separate trial of the perjury count. Proof of the perjury count required substantially the same evidence as was required to establish petitioner Kerner's guilt on the conspiracy and mail fraud counts, and separate trials would therefore have involved substantial duplication in the presentation of witnesses and evidence. Moreover, petitioner Kerner suffered no cognizable prejudice from joinder of the perjury count, since evidence of the perjury would in any event have been admissible at a separate trial of the conspiracy and mail fraud counts as a false exculpatory statement tending to show consciousness of guilt. See *United States* v. *Carson*, 464 F. 2d 424, 436 (C.A. 2), certiorari denied, 409 U.S. 949; *United States* v. *Sweig*, 441 F. 2d 114, 118–119 (C.A. 2), certiorari denied, 403 U.S. 932.

Petitioner Kerner relies on *United States* v. *Pacente*, 490 F. 2d 661 (C.A. 7), petition for rehearing *en banc* granted February 19, 1974. In that case, another panel of the Seventh Circuit held that a count charging perjury before the grand jury should not be joined with other counts because the perjury charge impeaches the defendant before the petit jury. But the perjury charge here was little different in that respect from the other charges against petitioners, all of which involved some form of deceitful, dishonest conduct. *Pacente* involved joinder of a perjury charge with non-deceitful conduct—interference with commerce by threats or violence—and therefore is distinguishable. But we further agree with the court of appeals below that "the holding in [*Pacente*] is bad law," for it would lead to repetitive trials involving duplicative

witnesses and evidence, and would thereby impose a severe strain on judicial, prosecutorial, and defense resources.

5. Both petitioners contend that they were entitled to separate trials.

a. Petitioner Kerner claims (Kerner Pet. 20–23) that he was prejudiced by denial of a severance. That claim rests upon the unsupported assumption that Isaacs, who refused to testify at their joint trial, would have furnished exculpatory testimony at a separate trial of Kerner alone. But Isaacs never indicated that he possessed evidence that would exculpate Kerner, nor did he ever intimate that he would be willing to waive his Fifth Amendment privilege in order to testify in a separate trial of Kerner. A defendant is not entitled to a severance on the bare possibility that a co-defendant's testimony will be available to him if and only if they are separately tried. *United States* v. *Johnson*, 426 F. 2d 1112, 1116 (C.A. 7), certiorari denied, 400 U.S. 842.[8] In short, petitioner Kerner's claim here is based on nothing more than mere speculation that a severance might have aided his defense. Such speculation is insufficient to show an abuse of the trial judge's discretion in refusing severance. *United States* v. *Blue*, 440 F. 2d 300, 302 (C.A. 7), certiorari denied, 404 U.S. 836; *Gorin* v. *United*

[8] Petitioner Kerner relies on *United States* v. *Shuford*, 454 F. 2d 772 (C.A. 4), and *United States* v. *Echeles*, 352 F. 2d 892 (C.A. 7). But in those cases the co-defendants had represented to the court, at the time of the motion for severance, that they would be willing to testify in favor of the defendant seeking severance if he were tried separately. There was no such representation here.

States, 313 F. 2d 641, 645–646 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Caci*, 401 F. 2d 664 (C.A. 2), certiorari denied, 394 U.S. 917; *United States* v. *Kilgore*, 403 F. 2d 627 (C.A. 4), certiorari denied, 394 U.S. 932; *Kolod* v. *United States*, 371 F. 2d 983, 990–992 (C.A. 10). This is particularly so where, as here, severance would have required duplication of a lengthy and complex trial. *United States* v. *Davis*, 418 F. 2d 59, 61 (C.A. 9).[9]

b. Petitioner Isaacs claims (Isaacs Pet. 21–28) that his defense was prejudiced by the perjury and false statement charges against Kerner and that he should have been granted severance on that account. We have shown above (pp. 20–22, *supra*) that joinder of the perjury charge with Kerner's other offenses was proper under Rule 8(b), Fed. R. Crim. P.[10] Joinder of Kerner and Isaacs as defendants was also proper under that Rule. The indictment alleged petitioners' joint participation in an illegal conspiracy and in vio-

[9] Petitioner Kerner also contends that the co-conspirator exception to the hearsay rule offends the Sixth Amendment's Confrontation Clause where the co-conspirator declarant refuses to testify. But Kerner's premise—that hearsay is invariably inadmissible where the declarant is unavailable for confrontation—has consistently been rejected by this Court. See *Pointer* v. *Texas*, 380 U.S. 400, 406–407. And in *Dutton* v. *Evans*, 400 U.S. 74, the Court upheld a broader Georgia co-conspirator exception under circumstances in which it was reasonably clear that the co-conspirator declarant would have asserted his Fifth Amendment privilege had he been called to testify. See also *United States* v. *Addonizio*, 451 F. 2d 49, 71 (C.A. 3), certiorari denied, 405 U.S. 936.

[10] Joinder of the false statement charges was also proper for the same reasons. Petitioner Kerner does not here object to the joinder of the latter charges.

lations of the Travel Act and the mail fraud statute; these allegations amply satisfied Rule 8(b)'s requirement that co-defendants be "alleged to have participated * * * in the same series of acts or transactions constituting an offense or offenses."

Petitioner Isaacs nevertheless argues that he was entitled to a severance because Kerner, who testified for the defense at trial, was implicitly impeached by the jury's awareness of the perjury charge. This argument is substantially identical to petitioner Kerner's argument for a separate trial of the perjury charge (see pp. 20–22, *supra*), and it fails for similar reasons. Petitioner Isaacs' claim of prejudice from the joinder is vague and insubstantial; it does not amount to a showing of an abuse of discretion by the trial judge, especially in view of the lengthy and extensive duplication of witnesses and evidence that separate trials would have required.

6. Petitioner Kerner contends (Kerner Pet. 23–24) that the false statements that he made to Internal Revenue Service agents during the course of their investigation of his federal income tax returns did not violate 18 U.S.C. 1001, because those statements were unsworn oral responses to questions asked by government "investigators." It is true that some courts have held that false statements made to Federal Bureau of Investigation agents are not within the purview of that statutory offense, on the ground that since that agency has no power to regulate, compel action, or dispose of claims, it has no "jurisdiction" within the meaning of the statute. See, *e.g., United States* v. *Lambert,* 470 F. 2d 354 (C.A. 5), petition for rehear-

ing *en banc* granted April 17, 1973; *Friedman* v. *United States*, 374 F. 2d 363, 368–369 (C.A. 8).[11] But it has long been understood that the Internal Revenue Service has the necessary "jurisdiction" under the statute and that false statements given to internal revenue agents pertaining to matters within that jurisdiction—such as an investigation into the correctness of federal income tax returns—are proscribed by 18 U.S.C. 1001. *United States* v. *McCue*, 301 F. 2d 452, 455 (C.A. 2) certiorari denied, 370 U.S. 939; *Knowles* v. *United States*, 224 F. 2d 168, 172 (C.A. 10); *Cohen* v. *United States*, 201 F. 2d 386, 392 (C.A. 9), certiorari denied, 345 U.S. 951.[12]

The fact that petitioner's false statements were oral and unsworn does not affect his liability under the statute. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46; *Neely* v. *United States*, 300 F. 2d 67, 69–71 (C.A. 9), certiorari denied, 369 U.S. 864. See also *United States* v. *Bramblett*, 348 U.S. 503, 508.

7. Petitioner Kerner claims (Kerner Pet. 25–27) that the specially appointed panel below exceeded its power in failing to follow the decision of a regular Seventh Circuit panel in *United States* v. *Pacente*,

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[11] The question of the validity of such decisions with respect to the FBI was left open by this Court in *Bryson* v. *United States*, 396 U.S. 64, 71, n. 10.

[12] *Paternostro* v. *United States*, 311 F. 2d 298 (C.A. 5), and *United States* v. *Philippe*, 173 F. Supp. 582 (S.D. N.Y.), on which petitioner relies, involved the different question whether an "exculpatory no" is a "statement" within the meaning of the statute. That issue is not raised by petitioner's affirmative false statements in explanation of an item on his income tax return.

supra. This contention is erroneous for several independent reasons.

First, there is no basis for petitioner's allegation that the panel below refused to follow *Pacente*. The panel expressly distinguished *Pacente* on its facts by pointing out (Pet. App. 51a–52a) the voluntary nature of Kerner's, but not Pacente's, appearance before the grand jury and the fact that perjury was merely one of nineteen charges here, whereas in *Pacente* the indictment contained only two counts. Moreover, the perjury count here was merely one of several counts alleging deceitful conduct, whereas it was the only such count in *Pacente*.

Second, even assuming the decision below conflicts with *Pacente*, one panel of a court of appeals has no obligation to follow the decision of another panel within the same circuit. See *United States* v. *Mount*, 438 F. 2d 1072, 1073–1074 (C.A. 9). And while a rehearing *en banc* is an appropriate means for resolution of an intra-circuit conflict, a litigant is not entitled to such a rehearing as a matter of right. *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247. Thus the special circumstances of this case, which preclude *en banc* consideration, do not warrant resolution by this Court of a purely intra-circuit conflict, especially since any such conflict apparently will be resolved by the Seventh Circuit in its *en banc* consideration of *Pacente*. See *Wisniewski* v. *United States*, 353 U.S. 901.

Third, it would have been inappropriate for the panel below to have applied the usual doctrine of *stare decisis* to any Seventh Circuit decision, such as *Pa-*

cente, decided after its appointment. The active judges of the Seventh Circuit presumably recused themselves here with the intention of avoiding even the appearance of sitting in judgment over one of their colleagues or of influencing the decision in his case in any way. They therefore could not have intended their decisions in other cases, rendered while petitioner Kerner's appeal was pending, to have bound the special panel that was hearing that appeal. For that reason, the panel was clearly correct in refusing to defer its decision until after *Pacente* was decided *en banc*.[13]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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[13]Petitioner Kerner also contends that the panel below refused to follow *United States* v. *Fellabaum*, 408 F. 2d 220 (C.A. 7), and *United States* v. *Ruthstein*, 414 F. 2d 1079 (C.A. 7), which he characterizes as holding that intent to commit acts supplying the jurisdictional element must be proven to establish a conspiracy to violate the Travel Act. In so contending, petitioner simply misstates the law of the circuit. The Seventh Circuit "has consistently affirmed conspiracy convictions where knowledge of the interstate element was not part of the trial court's conspiracy instructions." *United States* v. *Polesti*, 489 F. 2d 822, 824 (C.A. 7), petition for a writ of certiorari pending, No. 73-5489.

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